MAR 12 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 944-945

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a Bankrupt, *Petitioner*,

v.

JENNY R. MATHEWS, Executrix of the Estate of George B. Mathews, Deceased, *Respondent*.

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a Bankrupt, *Petitioner*,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendant and Third Party Plaintiff, *Respondents*,

v.

JENNY R. MATHEWS, Executrix of the Estate of George B. Mathews, Deceased, Third Party Defendant, *Respondent*.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a bankrupt, *Petitioner*.

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March 12, 1946.

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PETITION FOR WRIT OF CERTIORARI.

Merritt I. Edner, as Trustee in Bankruptcy, respectfully presents this petition, and prays that this Honorable Court grant a Writ of Certiorari and review the decision of these cases by the United States Circuit Court of Appeals for the Third Circuit, which said decision was delivered on October 16, 1945 (petition for reconsideration having been

denied on December 13, 1945) and affirmed the judgments of the United States District Court for the Western District of Pennsylvania, in favor of respondents; and in support of said petition, Merritt I. Edner represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

(The references (Pr. Tr.) are to the pages of the printed record from the District Court as filed in the Circuit Court of Appeals.)

Edner, the petitioner, is the Trustee in Bankruptcy of one George H. Lum; Mathews, the respondent, is Executrix of the Estate of George B. Mathews, deceased. Both Edner and Lum are residents of DuBois, in the Commonwealth of Pennsylvania; respondent Mathews is, and Mathews (deceased) was a resident of Buffalo, in the State of New York.

Edner, as such Trustee, filed two suits in the United States District Court for the Western District of Pennsylvania, the first on January 3, 1942 against George B. Mathews, the second on August 4, 1942 against the Massachusetts Mutual Life Insurance Company (Pr. Tr. 559a, 565a), in an endeavor to recover certain assets of Lum, the bankrupt. (Pr. Tr. 1a, 16a). By amendment to the second suit on February 24, 1944, Edner sought also an accounting between himself and Mathews of "all matters • • • which grow out of or are related to, the contract or arrangement of February 2, 1934" between Lum and Mathews (deceased), "and all other matters between the two necessary to such determination." (Pr. Tr. 21a-22a)

The entire controversy grows out of the said contract of February 2, 1934 between Lum and George B. Mathews (Pr. Tr. 9a). Since its date Lum has been declared a bankrupt, on October 31, 1940, and Edner, the petitioner, has been appointed his trustee; George B. Mathews died on February 3, 1942, and Jenny R. Mathews, the respondent, is the executrix of his estate. (Pr. Tr. 1a, 16a, 79a, 528a-529a)

Lum, in 1933, was in financial difficulties, and in danger of losing collateral which he had pledged to certain of his creditors. He appealed to Mathews (deceased) for financial help. Lum and Mathews (deceased) had then for many years been good friends and quite closely associated. (Pr. Tr. 49a, 78a).

According to the recital of the District Judge in his opinion (Pr. Tr. 544a-545a):

> "As a result of their negotiations, Mathews and Lum entered into a contract dated February 2, 1934 (Exhibit A attached to the complaint herein), wherein it was agreed that Lum would sell, and Mathews would buy, certain assets and property of him for $71,801.21. Among these properties were farms in the Town of Somerset, New York, three policies of insurance in the Massachusetts Mutual Life Insurance Company on the life of Lum, certain stocks in oil and gas companies in Pennsylvania (which by reason of merger resulted in one thousand shares of stock of the Mill Creek Gas and Oil Company being issued to said Mathews). As a result of this agreement, Lum's indebtedness to Mathews of $37,964.62 was cancelled; and Mathews advanced $71,801.21, to pay Lum's debts, making a total of $109,765.83.
>
> By this agreement Lum had a right to re-purchase the assets conveyed to Mathews for $109,765.83, plus four percent interest, when Mathews would return to Lum the notes Lum had given him, and any unsold collateral. This re-purchase option was to be kept alive by payments of $2800 a year in monthly installments; and if any required payment was one hundred and twenty days in arrear, the option was to be cancelled. Pursuant to this contract, Mathews paid off $71,801.21 of Lum's debts and secured the release of such debts and any collateral held by these creditors. Mathews then took over said collateral and Lum also delivered to Mathews deeds for the New York real estate."

Some further analysis of the contract between Lum and Mathews (deceased) is advisable.

As respects the option payments of $2800.00 per annum, it required only that they should be made "in equal

monthly installments" (Pr. Tr. 11a); it did not require such payments on any specific day, either on the contract monthly anniversary or any other day; payment during the month, and that only, seems to have been the obligation on Lum. Also, all income from the pledged assets were to be credited to Lum, as payments on his option.

Again, although the contract provided that Mathews (deceased) could at any time sell the pledged assets, any such sales were made subject, upon ten days notice to Lum as respected the personal property, and ninety days as respected the real estate, of the price and terms of any such proposed sale, to a "first right to purchase said property at that price and under those terms," reserved to Lum. (Pr. Tr. 12a)

Then followed the two contract provisions next quoted,—Mathews (deceased) being the party of the first part and Lum being the party of the second part therein referred to. (Pr. Tr. 12a-13a):

> "VII. It is the understanding of the parties that the party of the first part is entitled to recover from the items in this option and or the collateral attached to the notes now held by the party of the first part the entire indebtedness between the parties as it existed on the date of this contract and the purchase price of the assets hereby purchased, together with interest at 4% in dollars or such other units as may take the place of dollars, the total amount of which shall have approximately the same purchasing power at the time of recovery as $109,765.83 has on the date of this contract.
>
> VIII. When the party of the first part shall have received from the assets hereby purchased and or the collateral attached to the notes now held by the party of the first part a total of $109,765.83 or such other amount as shall represent the purchasing power thereof as elsewhere herein provided and 4% interest thereon, the notes and open account of the party of the second part to the party of the first part, hereinbefore listed shall be considered paid and the notes with unsold collateral attached will then be returned to the party of the second part."

The District Judge concluded that the contract of February 2, 1934, was "a valid contract of sale." (Pr. Tr. 552a) Petitioner contends and has always contended that it was a pledge. But however it may be characterized, Lum's rights, and therefore petitioner's rights, thereunder, depend in the very first instance upon whether or not Lum's credits and payments both as to amount and time were such as to keep alive his option (Pr. Tr. 11a-12a, 545a) to repurchase the pledged assets. The record, with respect to this specific issue, is as follows:

1. The contract of February 2, 1934, was prepared by Mr. Edward N. Mills, of the law firm of Albrecht, Maguire & Mills, of Buffalo, N. Y., as counsel for George B. Mathews. (Pr. Tr. 34a)

2. George B. Mathews at that time was a man well up in years and of rather infirm health. (Pr. Tr. 34a)

3. Joseph A. Albrecht, also a member of the law firm of Albrecht, Maguire & Mills, was attorney and agent of George B. Mathews, and "has personal knowledge of all the transactions with the bankrupt (i. e., Lum), and had direct charge of all negotiations with the bankrupt as agent for said George B. Mathews." (Pr. Tr. 492a)

4. Mills, testifying with respect to a "Statement of account of George B. Mathews against George H. Lum to January 1, 1939", as kept by Albrecht, Maguire and Mills, the attorneys and agents of Mathews (deceased) in all these transactions, stated that,

"The figures appear to be accurate",

and that, "His (i. e., Lum's) option, was paid up to that time." (Pr. Tr. 41a, 43a)

5. Mills testified further that Lum became in default with respect to the required option payments "in 1939, * * * within 120 days after the first of January according to the contract, he was in default." (Pr. Tr. 43a)

6. On January 12, 1939, default was declared in a letter from Albrecht, Maguire & Mills, J. A. Albrecht, to Lum. (Pr. Tr. 43a-44a, 92a).

7. "The loose-leaf original ledger sheets of the account of Mr. Mathews with Mr. Lum," as kept by Albrecht, Maquire & Mills, to December 31, 1939, are of record as Exhibits 8, 8a, 8b, and 8c. Pr. Tr. 39a-40a, 107a, 109a, 111a, 113a).

8. Witness Sproul, who audited the said account, testified that as of June 12, 1939, Lum had made payments or received credits in the option account as follows:

Year 1934,	$2,720.07
" 1935,	2,946.67
" 1936,	3,113.87
" 1937,	5,409.10
" 1938,	2,939.50
" 1939 (there being no further payments after Lum's default was declared),	116.77,
Total,	$17,245.92;

that at the monthly rate of $233.33 the total option payments or credits required by the contract for the period February 2, 1934 to June 12, 1939, was $15,026.45; and that "the credits, therefore, exceed the charges in the amount of $2,219.47," for the period ending June 12, 1939. (Pr. Tr. 500a-503a)

Such was the evidence before the District Court, addressed to the fundamental issue,—"Had Lum defaulted on the required option payments and thus forfeited his option rights to repossess the pledged collateral?"

The District Judge in his opinion recites the salient features of the contract of February 2, 1934, and performance thereunder by Mathews (deceased). (Pr. Tr. 544a-545a) Then immediately follow the statements that:

"Lum made option payments of $2,219.47, but became in default thereon. On January 12, 1939, Mathews informed Lum of default in the option. Since that time no further payments have been made on the option." (Pr. Tr. 545a)

Clearly, at this point the District Judge was laboring under a misapprehension. He was deciding the basic issue while of the erroneous impression that Lum's credit balance as of June 12, 1939, i. e., $2,219.47, was really the aggregate of Lum's option payments, whereas the evidence showed that Lum's option payments were $17,245.92. Being under that erroneous impression, the District Judge promptly, but again erroneously, concluded that "On these facts we are of the opinion that plaintiff is not entitled to relief in either action." (Pr. Tr. 545a-546a)

However, proceeding next to his Findings of Fact, the District Judge therein showed a correct understanding of the arithmetic of the option account. In finding 12 he stated:

"Lum made option payments and on June 12, 1939, had a credit balance of $2,219.47. On January 12, 1939, Mathews informed Lum of default on the option. Since that time no payments were made." (Pr. Tr. 552a)

Nevertheless and notwithstanding the foregoing correct finding of fact, made in strict accord with the uncontroverted evidence on the subject, the District Judge then made this Conclusion of Law:

"V. Lum's option rights under the contract were forfeited by a failure to maintain the monthly payments; and his trustee in bankruptcy is not entitled to recover the one thousand shares of Mill Creek Gas and Oil Company stock, as prayed for in C. A. 1769." (Pr. Tr. 553a)

The District Court denied the plaintiff's claim for relief in both actions. (Pr. Tr. 548a) The consequence is that the

Mathews Estate, Lum's principal creditor (Pr. 528a), has possession of all of Lum's assets. Lum's trustee in bankruptcy testified herein that he has not been able to get hold of any assets. (Pr. Tr. 529a)

On Appeal, the matter was submitted upon oral argument before Judges Albert Lee Stephens, Goodrich and McLaughlin of the Court of Appeals for the Third Circuit on October 9, 1945. The opinion of the Court was filed on October 16, 1945, being, verbatim, as follows: (Tr. 583-584)

> "Per Curiam
>
> These two cases come to the Court from judgments of the District Court for the Western District of Pennsylvania. They involve several questions, all of which we think are questions of fact. Upon these questions there was conflicting testimony and each side points to facts tending to support the conclusion it urges. We quite realize that the questions are arguable. But the District Judge, having all the testimony before him, resolved it in well defined conclusions. We think that all of his conclusions are supported by such evidence and that we could not say, if we would, that they are clearly erroneous.
>
> The judgments are, therefore, affirmed."

On December 13, 1945, the Circuit Court, by Judge Goodrich, entered its order denying the petition for rehearing, with Judge Biggs dissenting. (Tr. 589)

Thereafter, on February 26, 1946, petitioner filed in the Circuit Court of Appeals his Motion to Recall the Mandates and for Leave to File a further Petition for Rehearing. After oral argument before Judges Biggs, Maris and O'Connell on March 4, 1946, the said Motion was denied. (Tr. 5[illegible] 591)

B. THE JURISDICTION OF THIS COURT.

Jurisdiction of this Court to issue the Writ of Certiorari sought is found in U. S. C. A., Title 28, Sec. 347(a).

The final decree of the Circuit Court of Appeals for the Third Circuit was filed December 13, 1945.

C. THE QUESTIONS PRESENTED.

There are two questions presented for determination by this Court.

1. The construction of the contract between Mathews (deceased) and Lum, the bankrupt, entered into on February 2, 1934, and whether it was "a valid contract of sale," as found by the District Court, or was a pledge, as contended by this petitioner.

2. Whether or not Lum, the bankrupt, forfeited his right to repossess the pledged assets by failure to make the payments required to keep his option right alive.

D. REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

Petitioner respectfully submits, for the reasons enumerated below, that this petition is filed out of a firm conviction that this is a proceeding in which, to quote the language of this Court's Rule 38, sub-division 5(b), the Circuit Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court of Western Pennsylvania, as to call for an exercise of this Court's power of supervision.

1. The citizenship of the parties is diverse.

2. The property involved in each of the two suits, and that which would be involved in any final accounting between the parties greatly exceeds the sum of $3,000.00.

3. The District Judge rendered his opinion denying relief in both cases upon the basis of an erroneous construction of the contract between the parties; and further upon an erroneous understanding of the evidence pertaining to the option payments, which evidence was wholly uncontroverted.

4. The District Judge made a correct Finding of Fact respecting the option payments in strict accord with the

wholly uncontroverted evidence on that subject, but also made an incorrect Conclusion of Law with respect thereto, which was a complete *non-sequitur*.

5. The Circuit Court of Appeals failed to recognize that a basic question here involved was a question of law, i.e., the construction of the contract of February 2, 1934, between Mathews (deceased) and Lum, and never addressed itself to that question.

6. The decision of the Circuit Court of Appeals is predicated upon three conclusions: (a) the cases "involve several questions, all of which we think are questions of fact;" (b) the testimony was conflicting but the District Judge "resolved it in well defined conclusions;" and (c) "his conclusions are supported by such evidence;" whereas, the record demonstrates that said conclusions of the Circuit Court of Appeals are erroneous in that, (a) the fundamental questions embraced both questions of law and questions of fact; (b) the District Judge did not resolve the testimony in well defined conclusions, but on the contrary made findings of fact which were at variance with each other and with his findings on the same point in his opinion; and (c) certain essential conclusions of the District Judge are not only not supported by the evidence but in fact are in direct conflict with the uncontradicted evidence of record, and his correct finding of fact respecting the option payments, as already shown.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals of the United States for the Third Circuit and commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and titled on its docket as No. 8886, Merritt I. Edner, Trustee in Bankruptcy of George H. Lum, a Bankrupt, Plaintiff, Appellant,

v. Jenny R. Mathews, Executrix of the Estate of George B. Mathews, Deceased, Defendant, and No. 8887, Merritt I. Edner, Trustee in Bankruptcy of George H. Lum, a Bankrupt, Plaintiff Appellant, v. Massachusetts Mutual Life Insurance Company, a Corporation, Defendant and Third Party Plaintiff, v. Jenny R. Mathews, Executrix of the Estate of George B. Mathews, deceased, Third Party Defendant; and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court; and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

MERRITT I. EDNER, Trustee in Bankruptcy of George H. Lum, a bankrupt, *Petitioner.*

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